JD–45–00
Ripon, WI

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

FRANCISCO FOODS, INC.
D/B/A PIGGLY WIGGLY

AND Case No. 30–CA–14738

UNITED FOOD AND COMMERCIAL
WORKERS UNION, LOCAL NO. 73A,
AFL–CIO–CLC

Paul J. Bosanac, Esq.,
for the General Counsel.
James R. Macy and Tony J. Renning, Esqs.,
(Davis & Kuelthau, S.C.),
of Oshkosh, WI, for the Respondent.
William Haus, Esq.,
(Haus, Resnick and Roman),
of Madison, WI, for the Charging Party.

DECISION

Statement of the Case

MARTIN J. LINSKY, Administrative Law Judge: On May 17, 1999, the charge was filed in Case 30–CA–14738 by the United Food and Commercial Workers Union, Local No. 73A, AFL-CIO-CLC, herein Union, against Francisco Foods, Inc., d/b/a Piggly Wiggly, herein Respondent.

On August 30, 1999 and September 2, 1999 the National Labor Relations Board, by the Regional Director for Region 30, issued a Complaint and an Amendment to the Complaint, respectively, alleging that Respondent violated Sections 8(a)(1), (3), and (5) of the National Labor Relations Act, herein the Act. Respondent filed an Answer in which it denies that it violated the Act in any way. Further, Respondent asserts that the National Labor Relations Board lacks jurisdiction.

A hearing was held before me in Ripon, Wisconsin, on five consecutive days between September 27, 1999 and October 1, 1999.

Subsequent to the close of the hearing before me the Region petitioned the United States District Court for the Eastern District of Wisconsin for injunctive relief under Section 10(j) of the Act. The Region's petition for injunctive relief was denied and I hereby admit as ALJ Exhibit No. 1 Judge Rudolph T. Randa's written decision denying the injunction.

Based on the entire record in this case, to include post hearing briefs submitted by the General Counsel and Respondent, and upon my observation of the witnesses and their demeanor, I make the following

Findings of Fact

I. Jurisdiction

Pam Francisco had worked at the Piggly Wiggly grocery store in Ripon, Wisconsin for 25 years prior to May 16, 1999. For the past 6-½ years she was store manager. For the last several years the Piggly Wiggly Grocery store in Ripon was owned by Ripon Supermarkets, Inc., which was owned by Ron and Carol Bayer. Ron Bayer ran the store. In March 1999 Pam Francisco and her husband, Tom, formed a corporation named Francisco Foods, Inc., in order to purchase the assets of the store from the Bayers and to continue to operate it, as the Bayers did, as a Piggly Wiggly franchise grocery store.

Between mid-March 1999 and May 15, 1999 Respondent finalized the purchase of assets and hired employees to staff the store which operated in its normal manner up to May 15, 1999 under the management of Ron and Carol Bayer. The store closed a few hours early on May 15, 1999 and reopened the very next day, May 16, 1999, under new ownership, namely, that of Francisco Foods, Inc., and with the employee complement hired by Francisco Foods, Inc.

The jurisdictional allegations in paragraph 2 of the Amendment to the Complaint are as follows:

"(a) At all material times, Respondent, a Wisconsin corporation with an office and place of business in Ripon, Wisconsin (Respondent's facility), has been engaged in the operation of a retail food store.

(b) Based on a projection of its operations since about May 16, at which time Respondent began its operations, Respondent, in conducting its business described in paragraph 2(a), will annually derive gross revenues in excess of $500,000.

(c) During the period described in paragraph 2(b), Respondent in conducting its business operations described in paragraph 2(a), received goods and materials valued in excess of $5,000, directly from suppliers located outside the State of Wisconsin.

(d) At all material times, Respondent, has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act."

Respondent, in its Answer, admitted paragraphs 2(b) and 2(c) and denied paragraphs 2(a) and 2(d).

Respondent moves to dismiss the Complaint asserting that the Board lacks jurisdiction. According to Respondent, the retail standard of $500,000 was met, but the General Counsel failed to set ". . . forth evidence within the record for the other part of jurisdiction indicating an impact on interstate commerce."

In *Southern Dolomite* 129 NLRB 1342 (1961), the employer's gross volume of business exceeded $500,000, and there was evidence that $50,000 worth of goods and materials met the Board's indirect outflow-inflow test. The Board noted that jurisdiction is not established by the

gross dollar volume test, alone. There must be some ". . . proof of legal or statutory jurisdiction. . . " Proof of legal or statutory jurisdiction can be demonstrated by meeting the Board's outflow-inflow test.

The evidence in *Wurster, Bernardi & Emmons, Inc.,* 192 NLRB 1049 (1971), similarly involved $500,000 in gross revenues and $50,000 meeting the Board's indirect outflow-inflow test. But in that case, unlike here, the employer argued the Board should exercise its discretion to decline jurisdiction:

> The Employer in effect concedes that legal jurisdiction is present. It argues, however, that the Board should exercise its discretion to decline jurisdiction. To this end, the Employer asserts that the practice of architecture is essentially local in character. . . (Id.)

The Board rejected the employer's argument, and asserted jurisdiction.

The retail standard, involving a gross volume of business and proof of legal or statutory jurisdiction, can be met even with evidence that falls short of the Board's outflow-inflow tests. In *Aurora City Lines, Inc.,* 130 NLRB 1137 (1961), the employer argued that the Board did not have jurisdiction because the evidence demonstrated that the local transit company's gross volume of business amounted to approximately $400,000 and that it purchased materials originating outside the state valued at approximately $2,000:

> The Respondent moved to dismiss the complaint, contending, in effect, that apart from the purchase of materials valued at approximately $2,000, the record fails to support a finding that its operations "affect commerce." With respect to such purchases, the Respondent characterizes them as *de minimis.* Supra at 1138.

The Board rejected the employer's argument. On appeal to the Seventh Circuit, the employer raised this argument again. *NLRB v. Aurora City Lines, Inc.,* 299 F.2d 229 (7th Cir. 1962). The Court, too, rejected the employer's argument:

> In attacking the Board's jurisdiction, Aurora asserts that the doctrine *de minimis* should be applied to its purchase of $2,000 worth of materials, originating outside the State of Illinois. We do not agree. Supra at 231.

Here, Respondent admits paragraph 2(c), which reads:

> During the period described in paragraph 2(b), Respondent in conducting its business operations described in paragraph 2(a), received goods and materials valued in excess of $5,000, directly from suppliers located outside the State of Wisconsin.

If $2,000 is not *de minimis*, then $5,000 certainly is not. Accordingly, the Board has jurisdiction of this case and I find that Respondent is an employer who has engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. The Labor Organization Involved

Respondent admits, and I find, that the Union is now, and has been at all material times, a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. Overview

The Union represented a "wall to wall" unit of employees at the Piggly Wiggly store in Ripon, Wisconsin.

For over 30 years the Union has represented the employees at the store. The Union's representation of store employees precedes the ownership of the store by the Bayers.

The latest collective bargaining agreement was for the period February 1, 1996 to January 30, 1999 but the parties — the Bayers, for Ripon Supermarkets, Inc., and the Union on January 25, 1999 extended the agreement until a new agreement was reached. The agreement did not contain a successor clause requiring any purchaser of the business to recognize the Union.

On March 12, 1999 Union Business Representative Grant Withers spoke with Ron Bayer who told Withers that he was selling the store to his long time manager Pam Francisco. Bayer asked Withers to hold off telling the employees about the sale until he had a chance to do so first.

On March 15, 1999 Withers called Pam Francisco and spoke with her. Withers made notes of his conversation with Francisco and later had these notes transcribed. The transcribed notes provide, in pertinent part, as follows:

I asked to speak to Pam Francisco, when Pam answered the telephone I identified myself and asked Pam, "Have you and Ron informed the employees yet?"

Pam: "Yes, we did."

Grant: "Well Pam, the reason I'm calling is I'd like to know if you would be available for a meeting tomorrow?" (March 16, 1999)

Pam: "No, I have two appointments already."

Grant: "Well Pam, we need to know what your intentions are as far as recognizing the Union?"

Pam: "At the time, I don't think were going to."

Grant: "Really? Are you sure?"

Pam: "I may let my new employees decide what to do."

Grant: "By your statement, "my new employees," am I to assume you won't be keeping the current employees?"

Pam: "No, I'm not going to keep the bargaining unit."

Grant: "Is this for sure or would you like a few days to think about it?"

Pam: "No, at this point, I'm sure."

Grant: "Well that's unfortunate. I'm sure Ron (Bayer) could tell you, and you probably recall, how much the turmoil cost Ron in business when he bought the store sales that he never recovered. That is unfortunate, I'm sure you understand that we'll have to take whatever action we need to, to protect these jobs."

Pam: Sigh

Grant: "Okay, Bye""

I found Grant Withers to be a believable witness. He impressed me by his demeanor and I credit his testimony.

On March 16, 1999 attorney James R. Macy wrote a letter to Withers, which provided, in pertinent part, as follows:

> " This letter is to notify you that we represent Francisco Foods, Inc., and are assisting them in regards to the transition and purchase of the Piggly Wiggly store in Ripon, Wisconsin. As noted by Ms. Francisco, they anticipate considerable changes in regards to the operation of this store upon the completion of this asset purchase. In that regard, the Company does not anticipate assuming the collective bargaining agreement.
>
> While disappointed in your initial comments to the Company, we do anticipate a positive and professional transition. We respectfully request that if you have any further questions in regards to this transition, you direct them to our attention."

Thereafter, the Union held a series of meetings with the employees of the store on March 23, March 30, April 13, and May 12, 1999.

On March 16, 1999, prior to any of the aforementioned meetings between the Union and the employees about the purchase of the store the following notice was posted at the store:

> Tom and I are in the process of negotiating the purchase of Piggly Wiggly. We are both very excited about the prospect of owning the store.
>
> We anticipate that there will be a number of restructuring and reorganization changes made here at the store.
>
> Everyone who is presently employed now should please consider reapplying for employment at our store. By law, anyone interested in working for Francisco Foods Inc. must fill out a new application.
>
> Sincerely,
>
> Pam & Tom Francisco
> Francisco Foods, Inc.

Also on March 16, 1999 Ron Bayer, the owner of the Piggly Wiggly, posted a notice to employees, which provided, in pertinent part, as follows:

> This posting is to advise you that effective May 15, 1999, the entire assets of Piggly Wiggly store operated by Ripon Supermarket Inc. at 111 E. Fond du Lac St., Ripon, Wisconsin 54971 will be sold to another company.

> Soon you will receive a letter from the Company describing any severance benefits you may have available under the collectively bargained labor agreement.
>
> I would like to take this opportunity to thank you all for your past efforts on behalf of the Company and, also wish each and every one the best for you in the future.

General Counsel Exhibit 14 reflects that when Respondent opened for business on May 16, 1999 it had 46 people working for it. Seven were statutory supervisors armed with the authority to hire, fire and discipline and not employees within the meaning of the Act and 39 were employees of Respondent within the meaning of the Act on May 16, 1999. Of the 39 employees 16 had worked for the prior owners (the Bayers) and 23 were new hires. In other words a majority of the employees who went to work for Respondent were not former employees of the prior owner.

Respondent began running want ads for new employees on April 13, 1999 and began conducting interviews on April 21, 1999. The want ads ran in four different periodicals and people could pick up applications at the Buyers Guide office in Ripon, Wisconsin. Beginning on May 11, 1999 the ads contained the following language:

"No Experience Necessary
We Will Train You!!"

A large number of store employees applied for positions with Respondent. They wanted to keep working at the Piggly Wiggly.

Fourteen (14) employees of the predecessor employer applied but were not hired. It is alleged that these 14 employees were unlawfully refused hire. Respondent claims that four of these applicants were not hired for good cause, i.e., Respondent, familiar with their work performance, made a business decision not to hire four of these applicants. Respondent claims that with respect to the remaining ten (10) applicants that on May 12, 1999, just four days before the store opened under new management, that they withdrew their applications and, in doing so, informed management that didn't want to work for Respondent and, accordingly, were not hired.

If eight (8) or more of these 14 employees had been hired by Respondent then a majority of Respondent's work force would have been employees of the prior employer. And, since Respondent only needed 39 employees if just four of these were offered jobs a majority of Respondent's work force would have been employees of the predecessor employer.

It is alleged that Respondent violated Section 8(a)(1) and (3) of the Act when it failed and refused to hire these 14 employees and that its refusal to hire these applicant was done in order to avoid being a "successor" as that term is used in labor law as discussed more fully below. Respondent is also alleged to have violated Section 8(a)(1) and (5) of the Act when it refused to recognize the Union as the collective bargaining representative of its employees which it would be required to do if it was a "successor." Lastly Respondent is alleged to have violated Section 8(a)(1) and (5) of the Act by failing and refusing to apply the terms and conditions of the collective bargaining agreement in effect between the Bayers and the Union.

B. Legal Principals Involved

The Supreme Court held in *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272 (1972), that a new employer has a duty to recognize and bargain with the incumbent Union when two general factors, which can be summarized as (1) continuity of the work force and (2) continuity of the enterprise are present. Although *Burns* dealt with a successor employer's bargaining obligations to a newly certified Union, it is clear that the *Burns* rationale is equally applicable to situations where the Union is the established bargaining agent. *Fall River Dyeing and Finishing Corp. v. NLRB,* 482 U.S. 27 (1987).

In order to establish a "continuity of the work force," the former employees of the predecessor who were employed in the predecessor's bargaining unit must comprise a majority of the new employer's complement within that same bargaining unit. However, if the new employer refuses to hire employees of the old employer in order to avoid becoming a successor then the obligations of the new employer will be the same as if it did hire a majority of the former employer's employees. See, *U.S. Marine Corp.*, 293 NLRB 669, 670-671 (1989), enfd., 944 F.2d 1305 (7th Cir. 1991).

After establishing the continuity of the work force, the analysis proceeds to the second factor: the continuity of the enterprise. In evaluating the continuity of the enterprise, the Board looks to the following elements: (1) whether there has been substantial continuity of the same business operations; (2) whether the new employer uses the same facilities; (3) whether the same jobs exist under the same working conditions; (4) whether the new company employs the same supervisors; (5) whether the same equipment, machinery or processes are used; (6) whether the same products or services are offered; and (7) whether the new employer has basically the same body of customers. *Fall River Dyeing,* supra; see also: *Sierra Realty Corp.,* 317 NLRB 832 (1995); *Nephi Rubber Products Corp.,* 303 NLRB 151 (1991), enfd., 976 F.2d 1361 (10th Cir. 1992). The totality of the circumstances frames the analysis and the Board does not give controlling weight to any single factor. *Premium Foods, Inc.*, 260 NLRB 708, 714 (1982), enfd., 709 F.2d 623 (9th Cir. 1983).

An employer can be found to be a successor even if it purchases or assumes only a part of the predecessor's operations. *Miami Industrial Trucks*, 221 NLRB 1223, 1224 (1975).

Generally, another consideration in evaluating a *Burns* successor is whether there has been a hiatus between the cessation of the old operation and the commencement of the new business. *Fall River Dyeing*, supra. As a rule, the longer the hiatus the less likely an entity will be deemed a successor. In this case, of course, there was no hiatus. The Bayers' went out of business on May 15, 1999 (closing three hours early that day) and Respondent opened for business early the very next morning.

In *Burns*, the Supreme Court enunciated the principle that, "a successor employer is ordinarily free to set initial terms on which it will hire employees of a predecessor" without first bargaining with the employees' bargaining representative. The Court recognized an exception to this principle, however, in "instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit. . ." 406 U.S. at 294-95. The Board interprets this phrase to encompass situations where the successor's plan includes every employee in the unit as well as those where it includes a lesser number but still enough to make it evident that the Union's majority status will continue. *Spitzer Akron, Inc.*, 219 NLRB 20, 22 (1975), enfd.,

540 F.2d 841 (6th Cir. 1976), cert. den., 429 U.S. 1040 (1977), *Fremont Ford Sales, Inc.,* 289 NLRB 1290, 1296 (1988).

In *Spruce Up Corp.,* 209 NLRB 194, 195 (1974), the Board promulgated a specific test to determine whether the exception in *Burns* applies. Specifically, the Board found that the exception applies if either of the following circumstances exist: (1) whether the new employer has actively or, by tacit inference, misled employees into believing they would be retained without change in their wages, hours, or conditions of employment; or (2) whether the new employer has failed to announce its intent to establish a new set of conditions prior to inviting former employees to accept employment. 209 NLRB at 195.

The new employer is free to hire or not hire the employees of the former employer but violates the Act if it does not hire the employees of the former employer for an unlawful reason. Unlawful reasons would include not hiring someone because of their affiliation with a union or not hiring individuals in order to avoid hiring over 50% or a majority of the employees of the former employer and then being considered "a successor" and being required to recognize and bargain with the Union.

C. Factual and Legal Analysis

I do not believe Respondent actively or, by tacit inference, misled employees into believing they would be retained without change in their wages, hours, or conditions of employment because, among other reasons, Respondent placed want ads in the paper advertising that "No Experience Necessary. We Will Train You!!" Obviously the employees who worked for the Bayers had experience since they already worked at the store. In addition a number of employees asked Pam Francisco if they were going to be hired and Francisco told them she didn't known at that time. Accordingly, the employees at the store were not misled into believing they would all be hired. In addition, in his March 16, 1999 letter to the Union Respondent's attorney made it clear there would be some changes.

I therefore conclude that even though I find Respondent to be a *Burns* successor Respondent was free to set the initial terms and conditions of employment and was not required to either bargain with the Union about those initial terms and conditions of employment or required to continue to operate under the terms and conditions of the collective bargaining agreement between the Union and Ripon Supermarkets, Inc., i.e., the Bayers. Accordingly, Respondent did not violate the Act when it changed some terms and conditions of employment.

However, I do find that Respondent failed to hire certain employees in order to avoid becoming a *Burns* successor.

In the instant case it is alleged that Respondent unlawfully refused to hire four individuals because of work performance and failed to hire ten others because they withdrew their applications.

I conclude that Respondent did not want to recognize and bargain with the Union and deliberately set out to avoid "successor" status by hiring as its employee complement less than 50% of the former employer's employees.

Four employees who applied to work with Respondent and were not hired were Dan Chitwood, Jasmine Kimball, Jolene Nelson, and Peggy Taylor and with respect to these four employees Respondent claims it did not hire them because of performance problems.

Respondent was under no duty to hire any of these four individuals and made a decision not to hire them, I find, for valid business reasons and not because of an unlawful reason.

1. Dan Chitwood worked for the Bayers for a time in 1997 and then quit. He was rehired in 1998. While employed by the Bayers he was a high school student. He applied to work for Respondent and was not hired because of poor attendance. In the last year he had three unexcused absences.

Chitwood admitted that he had missed work and that Pam Francisco, who was store manager at the time, had spoken to him about his poor attendance. I find Respondent did not offer employment to Chitwood for legitimate business reasons and therefore did not violate the Act in not offering him employment.

2. Jasmine Kimball began employment at the store on April 16, 1999, just one month before Respondent began operations on May 16, 1999. In that short period of time Kimball had a problem with attendance. Because of a dispute over money with her husband from when she was separated Kimball was forced to go to the upper peninsula of Michigan from Ripon and was told she could have a day off but she wound up missing another day of work and even called then store owner Ron Bayer when she returned to make sure she still had a job. Bayer told her to come back to work. Pam Francisco decided not to hire Kimball because of this attendance problem. I find that Respondent did not hire Kimball for a legitimate business reason and did not violate the Act in not hiring her.

3. Jolene Nelson worked at the store when owned by the Bayers. She was a high school student. She graduated from high school after the Franciscos took over the store. She only worked in the store for five months as part of a co-op program with her school. Nelson was a special needs person. She was not hired by Pam Francisco and not recommended for hire by her immediate supervisor Joann Schrader because Nelson in the opinion of both Pam Francisco and Joann Schrader was extremely shy and had a difficult time dealing with customers although no customers had filed complaints with management about her.

Nelson, as noted, is a special needs person and appeared to be a very nice young lady when she testified before me but Respondent is not alleged to be guilty of not being nice but of violating the Act. I find that Nelson was not hired for legitimate business reasons and the Act was not violated by her not being offered employment.

4. Peggy Taylor started working at the store in 1996. Her supervisor was Joann Schrader. Schrader was asked by Pam Francisco who Schrader would recommend be hired and who she would recommend not be hired. Schrader did not recommend that Taylor be hired because she thought Taylor had a bad attitude.

In addition to Schrader's imput Francisco testified that she didn't hire Taylor because in May 1998 Taylor had written on a notice that had been posted by management the following language "that management is a bunch of assholes, their bitches, assholes, bastards, etc." Taylor, when shown the writing at the trial before me denied she ever wrote it. Francisco testified that in May 1998 she discussed the matter with Ron and Carol Bayer. Then store manager Francisco wanted to discipline Taylor but Ron Bayer, who was the boss, ordered that Taylor not be disciplined but that the notice with the writing on it be put in Taylor's personnel file and considered if there was another incident. Taylor was not confronted about the defaced notice at the time. Neither Ron nor Carol Bayer were called as witnesses. Francisco also considered in deciding whether to hire Taylor Francisco's belief that Taylor just prior to the defacement of the notice had threatened to fire a special needs employee named Rebecca.

Rebecca did not testify. Taylor denied this as well but Taylor admitted she had criticized Rebecca's work performance but not threatened to fire her. Francisco thought it to be highly improper for Taylor to threaten to fire anyone because Taylor had no authority to do so.

In any event, whether Taylor did what Francisco alleged she did or not, I find that Respondent, believing it true, did not hire her for these legitimate business reasons and therefore did not violate the Act.

I have applied a *Wright Line*[1] analysis and have concluded that even if motivated in part by union animus Respondent would have denied employment for legitimate business reasons to Chitwood, Kimball, Nelson and Taylor.

Respondent claims that ten employees of the Bayers, all of whom submitted applications for employment to Respondent, withdrew their applications and were not hired. Respondent claims that since they withdrew their applications they were lawfully refused hire.

The ten are Robert Schumacher, Alan Pipping, Penny Pipping, Robert Birkrem, Carrie Clark, Jamie Kotlowski, Tara Manthei, Ryan Sasada, Janet Simmons, and Tina Warriner.

Three of the ten, Robert Schumacher, Alan Pipping and his wife, Penny Pipping, had previously been offered jobs by Respondent. The other seven had not been offered jobs prior to the withdrawal of the applications.

On March 16, 1999 the employees were notified that if they wanted to work for Respondent they had to apply. As of May 12, 1999, just four days before the store would be operating under new ownership seven of the above ten employees still had not been told if they would still be working at the store or not. Five of the seven, Robert Birkrem, Carrie Clark, Jamie Kotlowski, Ryan Sasada and Tara Manthei were very young without much time invested in the store but two of the seven, Janet Simmons and Tina Warriner, were long time employees. Simmons had worked at the store for 11 years and Warriner had worked at the store for 12 ½ years.

One can only imagine what was going on in the minds of these people who were waiting to find out if they would have a job come May 16, 1999 or not.

It was well known throughout the store that if 50% or less of the employees at the store under Respondent's ownership had worked for the prior owners than Respondent would not have to recognize the Union. But if more than 50% of Respondent's employees had worked at the predecessor than Respondent would have to recognize the Union. The key question is whether Respondent refused to hire applicants in order to avoid being a successor and being required to recognize the Union.

The evidence at trial reflects the following:

1. On May 8, 1999 12 ½ year veteran and head cashier Tina Warriner asked Pam Francisco if she will be hired. Francisco says she is good with customers and has good attendance but asks Warriner if she can work non-union. I credit Warriner's testimony.

[1] 251 NLRB 1083 (1981), enfd., 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982).

2. On a date in May 1999, 27-year veteran Robert Schumacher, who was offered a job by Pam Francisco, asks her why not hire all the store employees and Pam Francisco tells Schumacher that she'll hire all back if they vote out the union. I credit Schumacher's testimony.

3. Evonne Everson was hired by Respondent a few days before the store opened under new ownership. She testified before me pursuant to subpoena and identified a statement she gave to the union dated April 6, 1999 before she was hired by Respondent. On the stand before me she said she intended to write the truth in her statement but was inaccurate. In her written statement she wrote that on March 24, 1999 she asked Pam Francisco if all the employees would be hired and Pam "stated only 50% of the employees because she wouldn't have the Union. Pam Francisco stated that she couldn't have the Union because she couldn't afford it." It is obvious to me, observing the demeanor of the witness and the fact that she now works for Respondent, that the truth is in Everson's statement on April 6 and not in her testimony before me.

4. Carrie Clark, a high school student, worked at the store and was not hired by Respondent. On May 5, 1999, just 11 days before the take over Clark met with Pam Francisco and asked Pam Francisco if she was going to be hired. Francisco told her that she was not at the top of Francisco's "firing list." Francisco went on to say that she was not keeping a lot of the students and there would be a lot of new faces because she wanted to keep the Union out. She told Carrie to keep that information in the office. I credit Carrie Clark's testimony.

5. Valerie Clark, Carrie Clark's mother, who used to work at the store but did not apply to work for Respondent, testified that she spoke with Pam Francisco on May 1, 1999 and asked if her daughter Carrie would be hired. According to Valerie Clark the following conversation took place between her and Pam Francisco:

"Q Okay. Now did you have at anytime a conversation with Ms. Francisco about your daughter Carrie?

A Yes..

Q When did that occur?

A May 1st. It was a Saturday. I believe it was two days after I picked up my final check and I was in the store, so.

Q Okay. And how did the conversation come about or where did it take place?

A I approached her because I was in the store for other reasons and I saw her in aisle five working and I approached her and I asked her if she knew yet if Carrie would have a job when she took over.

Q Did Ms. Francisco give you an answer?

A Yeah. She said she did not know yet.

Q Did she say anything else?

A She said she had to be very careful and get rid of fifty percent of the workers and she would make a decision as to Carrie probably in the next week.

Q When she talked about fifty percent of the workers did she say anything else that you recall?

A She – when she said she had to get rid of fifty percent of the workers I made some goofy comment. I think I said 'Oh God, that's like about everybody.' And she said this was not going to be a unioned (sic) store."

I credit the testimony of Valerie Clark.

6. Mike Ritchay had worked at the store since 1973 and at the time the Franciscos took over he was an Assistant Manager. He did not seek employment with Respondent and hasn't worked at the store since mid-May 1999.

After a meeting on March 15, 1999, when the sale of the store was announced, Mike Ritchay met with Pam Francisco and when asked what was said testified:

"She (Francisco) said that she was going around to the people that she wanted to hire and she stated it wouldn't be a union and that was about it."

A couple of days later Francisco spoke again with Ritchay. Ritchay testified as follows:

> "She had said maybe I spoke too soon or used the wrong words or whatever. That there wouldn't be a union, but if the employees wanted a union — the new employees wanted a union they could vote on it."

At another time Ritchay told Francisco he would not cross a picket line if Bob Schumacher was on it and Ritchay testified further "I kind of mentioned that you know Bob really wants the union in here. She says that's not going to happen." I credit the testimony of Mike Ritchay.

7. Jamie Harttert, a college student, applied to work for Respondent. She had never worked for the store when it was owned by the Bayers. She was interviewed by Pam Francisco on May 1, 1999 and told Francisco that she (Harttert) needed certain flexibility in her hours due to her having another part-time job and Francisco "explained to me that under the union that people would have to work a certain amount of hours per week and that I wouldn't be able to do every other weekend under the union. But since she was changing it to a nonunion, that she, you know I could work every other weekend." Francisco also warned Harttert that the union would probably be picketing when Harttert started work. I credit the testimony of Harttert.

8. Cari Wittchow worked at the store under the Bayers and was hired by Respondent. She still works for Respondent and testified pursuant to a subpoena issued by the General Counsel. Prior to the takeover Pam Francisco and Wittchow had a conversation. The General Counsel asked Wittchow the following "Let me ask you this, did she (Pam Francisco) say anything about the Union?" Wittchow's answer was "She said that you did not want to — she didn't want — how do I say it — she didn't want to acknowledge it at that time." During questioning by the union attorney Wittchow said Pam "did say, like I said, she didn't want to acknowledge the union at that time. That she would let it up to, you know, us to decide whether we wanted one or not." I credit Wittchow's testimony as to what she testified Pam Francisco told her.

9. Adam Simonis worked at the store for the Bayers and at the time he testified before me was an employee of Respondent. He testified that prior to the takeover "I asked her (Pam

Francisco) if there was going to be a union and she told me, not right away she was going to let the employees decide whether or not they wanted it or not." Simonis also testified that "I recall her saying something about — I don't think I'm going to make it right away if we had the union." The union counsel showed Simonis a statement dated July 13, 1999, almost two months after Respondent began operations, which Simonis wrote and signed which was addressed to "Mike, Grant, or whomever it may concern," Mike and Grant were union officials, which stated as follows:

> " I feel it would be best for me not to give statements anymore. Piggly Wiggly has been my first and only job. I enjoy working and its something I've excelled in. I'm not going to put my job on the line. Too many bad things have happened to too many good people. I don't want to be another..
>
> I'm sure you have enough info to get what you guys want. I wish you guys luck and hope the best for everyone."

10. On September 30, 1999 Joseph Curtis testified before me. The General Counsel questioned him and Curtis, who worked for the Bayers and currently works for Respondent, testified that Pam Francisco "said that she could hire back 50 percent of each — in each department if she took the union back, and which would have been — I would have been fired." Later Francisco told Curtis that she could now hire him.

On October 1, 1999 Respondent called Curtis as a witness in its case and Curtis testified that he had been mistaken the day before when he testified that Pam Francisco talked about the 50% rule and it was meat manager Paul Maxwell who had said it. Maxwell who still works at the store did not testify. Maxwell is the meat manager and was the meat manager when he worked at the store under the Bayers.

On cross-examination Curtis said that he had called Respondent's attorney at home the night before to say he wanted to be recalled to correct his testimony and talked to no one else about his testimony. Curtis said he got Macy's phone number out of the phone book after Paul Maxwell told him that Macy lived in Oshkosh, Wisconsin. However, Curtis could not spell Macy's name. Curtis was given a phone book, which is the same as the one he claimed he found Macy's home telephone number in and Curtis looked for Macy's telephone number for over 15 minutes without success. In response to one of my questions Curtis conceded it was possible that someone gave him Macy's phone number.

Suffice it to say I believe it was Francisco and possibly also Maxwell who mentioned the 50% matter to Curtis. And Curtis was trying to undo some damage from his testimony the day before. I am convinced that Respondent's counsel did nothing improper however.

11. I note again the credited testimony of Grant Withers that Pam Francisco in their March 15, 1999 conversation said that she was not keeping the bargaining unit and would let her "new" employees decide whether to be union or non-union.

Pam Francisco denied making the statements attributed to her by Tina Warriner, Bob Schumacher, Carrie Clark, Valerie Clark, Mike Ritchay, Jamie Harttert and also denied the statements attributed to her in Evonne Everson's pre-hearing statement and Joseph Curtis' testimony before his recantation.

I found Warriner, Schumacher, Carrie Clark, Valerie Clark, Mike Ritchay, Jamie Harttert credible. I credit their testimony over the denials of Pam Francisco. In addition, I find that the

truth lies in Evonne Everson's pre-hearing statement and in Joseph Curtis' testimony the first day and not his testimony the second day.

The employees of the Bayers were treated like puppets on a string. Francisco didn't want to recognize the union and refrained from offering jobs to employees of the Bayers until she was sure that less than a majority of Respondent's employees would be former employees of the predecessor. At the same time employees are waiting to see if they had a job Francisco is advertising for employees and advising prospective employees that no experience is required.

Based on the entire record it is crystal clear to me and I believe would be to anyone who saw and heard the witnesses in this case that to avoid successorship status Respondent did not hire a number of employees.

It is with this backdrop that I look at the ten applicants for employment who asked that their applications be returned.

Tara Manthei, a high school student, on May 12, 1999 asked Pam Francisco for her application back after her mother, Susan Manthei, told Tara that she had spoken with Pam Francisco and Tara was not going to be hired. I credit the testimony of Carrie Clark that Pam Francisco told her that a lot of the students would not be hired to avoid the union. Tara kept her application for a while and then threw it away.

On May 12, 1999, just four days before Respondent took over the store eight employees led by Bob Schumacher went into the office of Pam Francisco, which she shared at that time with Ron Bayer, and asked for their applications back.

This group consisted of Bob Schumacher, union steward Tina Warriner, Robert Birkrem, Carrie Clark, Jamie Kotlowski, Penny Pipping, Ryan Sasada, and Janet Simmons.

Two of these employees, Bob Schumacher and Penny Pipping, had been offered jobs but the others had not as yet been offered jobs or been told they would not be offered jobs. Again, puppets on a string.

A rumor had spread to the employees that if they had an application pending with Respondent they would not be eligible to received unemployment. Tina Warriner testified that meat manager Paul Maxwell had said this. And this was the reason that they asked for their applications back so they would not be ineligible for unemployment. Maxwell is the meat manager and under Respondent is a statutory supervisor since he is armed with authority to hire, fire, and discipline. He was not called to the stand in the trial before me.

The group of eight spoke with Francisco and said they wanted their applications back. Penny Pipping also said to Francisco that she wanted her husband Al Pipping's application back as well. Al Pipping had been offered a job previously. Pam Francisco told Penny that she couldn't give Al Pipping's application to her. Francisco told these employees that the applications were at her home and she left to get them. She couldn't find them and returned later that day to say she would bring them in the next day, i.e., May 13, 1999.

At a union meeting later that night, May 12, union officials told the employees that the rumor that if you had an application pending you could not collect unemployment was false, that it was a mistake to withdraw their applications, and they should resubmit them. Of course, the employees had not as yet gotten their applications returned because Francisco had been unable to find them earlier on May 12, 1999.

The following day Francisco came to the store with the applications. She gave the applications of Penny Pipping, Carrie Clark, and Jamie Kotlowski, back to them and each woman ripped up her application in Francisco's presence.

Tina Warriner received her application but returned it to Francisco by putting it back on the desk that Francisco and Ron Bayer shared in the store's office.

Janet Simmons told Francisco that she (Simmons) had changed her mind and Francisco should keep her application.

Bob Schumacher never got his application back and did not again ask for its return.

Ryan Sasada, when offered his application back by Francisco, said he didn't want it back.

Robert Birkrem never got his application back and did not again ask for its return.

When Al Pipping's application was given to him he handed it back. He testified he inspected it to make sure it was signed and dated.

I find that the act of attempted withdrawal of applications was effectively reversed by Warriner, Simmons, Schumacher, Sasada, Birkrem and Pipping, even if his wife could speak for him in requesting its return.

Based on all the evidence I am convinced that Respondent in making its hiring decisions wanted to make sure that more than 50% of its workforce was made up of individuals who had not worked at the store under the Bayers in order to avoid successorship status and be required to recognize the Union. This is a violation of Section 8(a)(1) and (3) of the Act.

On May 11, 1999 the day before anyone requested the return of their applications Pam Francisco called the police and told the police that picketing was expected at the store on May 16, 1999, the day Respondent began operations. If Respondent was going to hire the people who the following day withdrew their applications and recognize the Union would she have needed to call the police and tell them she expected picketing. Francisco expected picketing because she had no attention of hiring as a majority of her work force the former employees at the store and thereby be required to recognize the Union. To hold it against Birkrem, Clark, Kotlowski, Manthei, Sasada, Simmons, and Warriner that they withdrew their applications and weren't hired for that reason when they had no chance to be hired in any event would be horribly unfair.

Respondent's intent was to avoid hiring as a majority of its work force the employees of the predecessor and avoid successorship status and this intent is not inconsistent with offering a job to 27-year veteran Bob Schumacher, who supported the union, because avoiding successorship status was the unlawful intent.

Francisco, in her testimony, concedes that she said her new employees can decide if they want a union or not but that is not the test. If a successor Respondent must recognize the Union and it is not sufficient to say her employees can decide later if they want the Union or not.

How many of the 14 alleged discriminatees would have been hired had Respondent not structured the hiring to avoid the union. The four discriminatees that were not hired for

performance problems, i.e., Dan Chitwood, Jasmine Kimball, Jolene Nelson and Peggy Taylor, I find would not have been hired in any event. However, the remaining ten discriminatees absent unlawful hiring motivation by Respondent would have been hired. Schumacker, Birkrem, Alan Pipping, Sasada, Simmons, and Warriner by their actions reversed their positions regarding the withdrawal of their application and all six left the applications with Francisco. Penny Pipping, Carrie Clark, and Jamie Kotlowski ripped up their applications but only because they were forced into an untenable position due to Respondent's unlawful efforts to avoid being a *Burns* successor. The same is true for Tara Manthei who asked for her application back because her mother had told her that Francisco was not going to hire her. Tara Mathei was a high school student and Francisco told Carrie Clark that students would not be hired and there would be "new faces" at the store in order to avoid the Union.

As of May 16, 1999 there were 39 employees and seven statutory supervisors. Sixteen had worked for the predecessor and 23 were new employees. If the ten discriminatees had been hired then the breakdown would be that 26 employees would have been employees of the predecessor and 13 would have been new employees and Respondent would meet the first part of the two part test to be a successor because a majority of its employees would have been employees of the predecessor. If the three who ripped up their applications in front of Francisco were not hired and only seven of the discriminatees hired the break down of the 39 employees needed to run the store would be 23 former employees of the predecessor and 16 new employees. In other words, a clear majority would be employees of the predecessor.

With respect to the second part of the successor test I note that Respondent, like its predecessor, is a grocery store. The ownership transition does not materially affect employee duties, conditions or processes. Respondent offers similar kinds of products as its predecessor and still markets primarily to consumers.

To be a successor under *NLRB v. Burns International Security Services,* supra, Respondent must have "acquired substantial assets of its predecessor and continued, without interruption or substantial change the predecessor's business operations. *Golden State Bottling Co. v. NLRB,* (414 U.S. at 184)" *Fall River Dyeing & Finishing v. NLRB,* supra. More specifically, Fall River sets forth certain factors considered in determining successorship:

> Under this approach, the Board examines a number of factors: whether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products, and basically has the same body of customers. [Citations omitted, *Fall River* at 43.]

The facts in this case show a "substantial continuity" between the predecessor and successor employers. Respondent operates a Piggly Wiggly franchise grocery store at the same location as the predecessor, utilizing the same equipment and facilities; attracts the same customers; offers basically the same product lines; employs supervisors who worked for the predecessor; and employs employees in the same working classifications and under the same working conditions as the predecessor.

Since Respondent is a successor it has a duty to recognize the Union and bargain with it in good faith.

Since Respondent violated the Act in denying employment to the ten discriminatees it should offer them positions and make them whole by the payment of backpay.

Under *Burns*, supra, I find that Respondent could set initial terms and conditions of employment and I will not order that Respondent apply the terms and conditions of the collective bargaining agreement in effect between Ripon Supermarkets, Inc. (the Bayers) and the Union.

Conclusions of Law

1. Francisco Foods, Inc. D/B/A Piggly Wiggly is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. UFCW Local #73A is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) and (3) of the Act when it denied employment to ten employees in order to avoid becoming a successor employer and thereby be required to recognize and bargain with the Union.

4. Respondent violated Section 8(a)(1) and (5) of the Act when it refused to recognize and bargain with the Union when requested to do so.[2]

Upon the foregoing findings of fact and conclusions of law and pursuant to Section 10(c) of the Act, I hereby issue the following recommended

ORDER[3]

Respondent, Francisco Foods, Inc., d/b/a Piggly Wiggly, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Failing and refusing to hire applicants for employment in order to avoid becoming a successor employer with an obligation to recognize and bargain with a Union.

(b) Refusing to recognize and bargain with the Union.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request of the Union, recognize and bargain with the Union as the designated and recognized exclusive collective bargaining representative of the employees of the Respondent on wages, hours and other terms and conditions of employment.

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[2] I do not consider it necessary in this case to make independent findings with respect to numerous alleged Section 8(a)(1) statements in the Complaint by Pam Francisco in the period between March and May 1999. Although as my decision reflects I find she made most of these statements.

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board, and all objections to them shall be deemed waived for all purposes.

(b) Within 14 days from the date of this Order offer the below named ten discriminatees jobs similar to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them: Robert Birkrem, Carrie Clark, Jamie Kotlowski, Tara Manthei, Alan Pipping, Penny Pipping, Ryan Sasada, Robert Schumacher, Janet Simmons, and Tina Warriner. Backpay to be computed on a quarterly basis as prescribed in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region post at its facility in Ripon, Wisconsin, and all places where notices customarily are posted, copies of the attached notice marked "Appendix A."[4] Copies of the notice, on forms provided by the Regional Director for Region 30, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees customarily are posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and employees employed by Respondent or Ripon Supermarkets, Inc. at any time since March 16, 1999.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. March 31, 2000.

_____
Martin J. Linsky
Administrative Law Judge

[4] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to recognize or bargain in good faith upon request by the Union regarding our employees.

WE WILL NOT fail and refuse to hire applicants for employment in order to avoid becoming a successor employer and thereby required to recognize and bargain with the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer immediate and full employment to the below listed ten discriminatees to their former jobs with Ripon Supermarkets, Inc., or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits resulting from our refusal to hire them less any interim earnings, plus interest: Robert Birkrem, Carrie Clark, Jamie Kotlowski, Tara Manthei, Alan Pipping, Penny Pipping, Ryan Sasada, Robert Schumacher, Janet Simmons, and Tina Warriner.

WE WILL, upon request by the Union, bargain in good faith concerning wages, hours, and other terms and conditions of employment of our employees.

FRANCISCO FOODS, INC. d/b/a PIGGLY WIGGLY
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 310 West Wisconsin Ave., Suite 700, Milwaukee, Wisconsin 53203–2211, Telephone 414–297–1819.